IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No. 142 of 2006
With
CIVIL APPLICATION No. 5888 of 2006
In
APPEAL FROM ORDER No. 142 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE P.B.MAJMUDAR

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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JAYANTIBHAI MAFATBHAI PATEL AND OTHERS
Versus
DILIPBHAI BECHARBHAI PATEL AND ANOTHER

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Appearance :
MS TRUSHA K PATEL for Appellants.
MR ABHAYKUMAR P SHAH for Respondent No.1.
RULE SERVED for Respondent No.2.

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CORAM : HONOURABLE MR.JUSTICE P.B.MAJMUDAR

Date : 27/09/2006

ORAL JUDGMENT

The appellants herein are the original defendants No.2 to 4 of Special Civil Suit No.41/2006, which is filed by the plaintiff against them as well as against respondent No.2 – Vikrambhai Chimanbhai Patel for specific performance of the suit agreement as well for revocation of the registered sale deed executed by defendant No.1 in favour of defendants no.2 to 4.

The case of the plaintiff is that defendant No.1 is the owner of the property situated at Dascroi – taluka of Ahmedabad district, bearing survey no.280, admeasuring 5868 sq.mtrs. Defendant no.1 had agreed to sale the aforesaid land and for that an agreement to sale was executed by defendant no.1 in favour of the plaintiff for Rs.4.50 lacs and said agreement to sale was executed on 22nd January, 2004, which was ultimately notarized on 30th April, 2004. As per the said agreement, the sale deed was to be executed within 36 months and at the time of executing said document, the plaintiff had paid Rs.1 Lacs by cash to defendant no.1. It is mentioned in the plaint that said part consideration of Rs.1 Lac was paid in cash by various installments. Defendant no.1, thereafter, executed a sale deed in favour of defendants no.2 to 4 for Rs.17,60,500/- which is a registered sale deed. According to plaintiff, defendant no.1 should not have sold that property to defendants no.2 to 4 by ignoring the agreement to sale in favour of the plaintiff. Accordingly, suit is filed for specific performance of suit agreement and it is prayed that the sale deed executed by defendant no.1 in favour of defendants no.2 to 4 also may be revoked. In the said suit, permanent injunction was prayed for by restraining the defendants from transferring, alienating or dealing with the suit property in any manner. In the said suit, the original plaintiff has also submitted an application at Exh.5 for interim injunction restraining the defendants from transferring, alienating or dealing with the suit property in any manner till the final

disposal of the suit.

The appellants, who are original defendants no.2 to 4, resisted the said suit on various grounds. It is the case of the aforesaid defendants that they are bona fide purchasers for value without notice and that they have paid full consideration by cheques. It is their case that they have developed the land and they have constructed about twelve bungalows. Said defendants have also produced development permission, which was granted by the authority in their favour. It is also their case, that even before executing the sale deed, registered Banakhat was also executed by defendant no.1 in their favour. It is also their case that prior to execution of sale deed in question, public notice was also given by them through their advocate on 29-3-2005, whereby objections were invited in connection with that transaction. Such public notice is in compilation at page No.66. It is also the case of defendants no.2 to 4 (the purchasers of the land in question) that the plaintiff and defendant no.1 have colluded with each other in order to get out from the registered sale deed which is executed by the original owner in favour of defendants no.2 to 4 and, therefore, with the help of original owner the plaintiff has filed aforesaid suit.

Defendant no.1, who was the original owner of the property in question, has denied the claim of the plaintiff, however, in his written statement, he has stated that property sold to defendant nos.2 to 4 was sold with the existing rights of the plaintiff. It is also averred in the written statement by original owner that defendants no.2 to 4 were informed about the agreement to sale, which was executed by him in favour of original plaintiff.

Learned trial Judge, after hearing the concerned parties, partly

allowed the injunction application, by which defendants no.2 to 4 were permitted to complete the construction but they were restrained from transferring the suit property to anyone. Being aggrieved by the said order, defendants no.2 to 4 have filed this Appeal from Order under Order 43 of Civil Procedure Code.

Ms.Trusha Patel, learned advocate for the appellants (original defendants no.2 to 4) vehemently submitted that the plaintiff's case is absolutely false and only in order to defeat the claim of defendants no.2 to 4 suit is filed by the plaintiff with the help of original owner (defendant no.1). It is submitted by her that the plaintiff is residing in the same area where the suit property is situated, i.e., Thaltej area and it is not possible to believe that the plaintiff was not aware that construction is going on in the disputed land though a large construction is completed. It is submitted by her that due to the interim order granted by the trial Court, defendants no.2 to 4 are unable to transfer the bungalows even though a large amount is invested by them and defendants no.2 to 4 are suffering a huge monetary loss because of the injunction granted by the trial Court. It is also submitted by her that when defendants no.2 to 4 came to know about the alleged Banakhat in view of the suit filed by the plaintiff, immediately they have filed a criminal complaint against original owner as well as the plaintiff of the suit. In the said complaint, trial Court has not released them on bail but High Court has granted anticipatory bail to them. It is submitted by her that filing of the suit is nothing but abuse of process of law. It is further submitted that a false document is created by the plaintiff in the form of agreement to sale with the help of the original owner, only in order to defeat the claim of defendants no.2 to 4 and the suit is filed only in order to extract more money from defendants no.2. It is submitted that, therefore, the order of injunction granted by the trial Court is required to

be vacated as neither prima facie case nor balance of convenience is in favour of the plaintiff.

Mr.A.P.Shah, learned advocate for respondent no.1 (original plaintiff) has supported the order of the trial Court. It is submitted by him that prior to the sale deed executed by defendant no.1 in favour of defendants no.2 to 4, there was an unregistered agreement to sale in favour of his client and, therefore, in case the suit is decreed, the plaintiff will not be able to enjoy the fruits of the decree, if the property is allowed to be transferred during the pendency of the suit. He further submitted that order of injunction granted by the trial Court is an equitable order by partly granting injunction and, therefore, the impugned order is not required to be interfered with by this Court.

I have heard both the learned advocates and I have also gone through the voluminous documentary evidence on record. In my view, the order of the trial Court is absolutely unsustainable.

The following aspects are not in dispute :

(i) Prior to the sale deed, defendant no.1 executed a registered document of agreement to sale in favour of defendants no.2 to 4 and at that time, Rs.7 Lacs were paid to defendant no.1 by various cheques.

(ii) Subsequently, a registered sale deed was executed by original defendant no.1 in favour of defendants no.2 to 4 wherein entire sale consideration of Rs.17,60,499/- was paid by making payment of remaining consideration. Said amount was also paid by cheques.

(iii) Before executing the sale deed, a public notice was given by defendants no.2 to 4 on 29th March, 2005, and none had objected by giving any reply in any manner in response to that public notice.

(iv) On the basis of the sale deed, development permission was granted by local authority to present defendants no.2 to 4 and considerable construction had taken place at the time when the plaintiff, i.e., respondent no.1 herein filed the aforesaid suit.

(v) Defendants no.2 to 4, thereafter, even instituted criminal complaint against the land owner, i.e., respondent no.2 herein as well as against the original plaintiff, i.e., respondent no.1 herein.

(vi) The plaintiff has filed the suit on the basis of unregistered agreement to sale wherein it is stated that at the time of executing the agreement, he has paid Rs.1 lac cash by way of installments.

(vii) The plaintiff has not stated as to when and in which manner installments covering the amount of Rs.1 lac were paid.

(viii) So-called agreement to sale is of 22nd January, 2004, as against that it is notarized on 30th April, 2004.

(ix) The plaintiff has not given any particulars about the payment of Rs.1 lac as to in which manner the payment is made, and whether any amount was withdrawn from any bank account or it was borrowed from anyone.

Learned advocate Mr.Shah has fairly stated that today he is not in a position to state as to in which manner, his client has paid Rs.1 lac whether by borrowing money or by withdrawing amount from any bank account. He, however, submitted that amount is paid by installments, however, no particulars are given in this behalf in agreement to sale as to when the said amount was paid.

Aforesaid circumstances, clearly go to show that only on the basis of unregistered document, the plaintiff has tried to assert his right. The facts of the case clearly indicates that the original owner has joined hands with the plaintiff of the suit and both of them have tried to disturb the transaction, which had taken place by way of registered sale deed in favour of defendants no.2 to 4. It is pointed out to the Court by learned advocate for the appellants that subsequently, the land owner (defendant no.1) and plaintiff of this case have entered into another transaction of sale that clearly shows that they have cordial relations. Not only that they are distinct relatives and only in order to harass defendants no.2 to 4 and to get more money from them aforesaid suit is filed. It is required to be noted that, in the present suit, by filing written statement it is averred by defendant no.1 that the property is sold to defendants no.2 to 4 with a rider that there is an agreement to sale in favour of present plaintiff, that clearly shows that plaintiff and defendant no.1 are trying to help each other, otherwise, there was no question on the part of defendant no.1 for taking such stand, especially when there is no such recital in the registered sale deed executed in favour of defendants no.2 to 4.

It is not possible to believe that the plaintiff has paid Rs.1 Lacs in cash by different installments as no particulars are given in this behalf. It is required to be noted that subsequent to the complaint of the present

appellants, original land owner, i.e., defendant no.1, had filed a complaint against present appellants stating that the appellants have not made any payment to him, though he had agreed to make such payment, that itself, shows that only in order to get money from defendants no.2 to 4, plaintiff and original owner of the land have taken out present proceedings.

If the agreement to sale was genuine, naturally, the plaintiff would have mentioned said fact in the sale deed or even in agreement to sale executed in favour of defendants no.2 to 4, which is a registered document. However, there is no such reference and, therefore, this theory is got up subsequently by which defendant no.1 has taken aforesaid stand.

Apart from that, it is also required to be noted that defendants no.2 to 4 have paid entire amount through cheques. Not only that development permission is also obtained by them and prior to that, land was converted into non-agricultural land. Subsequently construction is also put up and, it can be presumed that construction must have taken some time, yet the plaintiff, who is residing in the same vicinity has never bothered to prevent such construction by filing the suit at the earliest. Not only that neither the land owners nor the plaintiff of the present suit has given reply to the public notice given by defendants no.2 to 4 before the sale deed was executed.

Learned trial Judge has not considered aforesaid aspect in his entire judgement. Without considering the prima facie case and balance of convenience in its true perspective, learned trial Judge has merely observed as under :

> "In my view there should be previous criminal record of the parties for creating doubt. L.A. for deft. submitted at mark 55/1 copy of registered sale deed 1379 dated 1-6-06 which is document between plaintiff and defendant No.1 for other property. According to him the documents shows relation between parties which further establishes collusion between parties. In my view this document also shows that parties are in habit of entering into healthy transaction. Now this is suit for specific performance of contract. Plaintiff has paid court fees of Rs.30,000/- There is no concrete evidence about fabrication of banakhat. It would be difficult to say that contract to sale is created afterwards. However till proved otherwise by leading evidence for at the time of final hearing of evidence. At this stage this court cannot decide that the disputed contract to sale it created afterwards."

Learned trial Judge also found that at the time of deciding application for interim injunction, it is not necessary for the Court to examine the merits of the case to ascertain whether the plaintiff is likely to succeed. Learned trial Judge also found that in order to make out a prima facie case for getting interlocutory injunction, plaintiff need not establish his title and that he can merely show that he has a fair question to be tried as to the existence of his legal right. It is difficult to appreciate the reasoning given by the learned trial Judge. As a matter of fact, it is the requirement of Order 39 that there has to be prima facie case and Court is also required to consider balance of convenience aspect. At least, learned trial Judge should have considered whether prima facie, the agreement to sale is believable or not. Learned Judge has not considered matter from various angles, as pointed out in the earlier part of this judgement. It is not the law that moment the suit is filed, trying to make out some case, by ignoring the material on record injunction must follow. If material is not be considered at the time of deciding injunction application, Courts will be flooded with frivolous litigations. Therefore, the Court is required to examine minutely the merits of the case and the circumstances in existence, which, unfortunately, has not been done by

the learned trial Judge in the instant case.

When the trial Court has permitted defendants No.2 to 4 to complete the construction, by preventing them from transferring the property, it would put defendants no.2 to 4 to a financial loss, especially when the plaintiff has failed to make out his prima facie case. Therefore, order of the learned trial Judge is not sustainable.

Mr.Shah, learned advocate for respondent no.1 fairly submitted that he is not in a position to explain as to why the so-called agreement to sale, which signed by his client and the original land owner in January, 2004 is notarized in April, 2004.

Prima facie, said agreement to sale does not inspire any confidence at all. In my view, therefore, defendants no.2 to 4 are not required to be prevented from dealing with the property in their own way. Moreover, in case the suit is dismissed, defendants no.2 to 4, who are not in a position to deal with the property, may be put to a grate financial loss, as learned advocate Ms.Patel pointed out that even though various persons have booked their respective houses, they are unable to get the possession in view of the injunction and defendants no.2 to 4 are also not in a position to execute any document in favour of such persons.

In view of what is stated herein above, in my view, order of the trial Court is not sustainable, however, it is directed that whatever may be the transaction that defendants no.2 to 4 may enter into with regard to the suit property, the same shall be subject to the final outcome of the suit.

Ms.Patel, learned advocate for the appellant submitted that

appropriate proceedings for perjury are required to be initiated against the plaintiff for producing false document. However, said aspect is not required to be considered at this stage and ultimately, at the conclusion of trial, if the trial Court is of the opinion that the agreement on which reliance is placed by the plaintiff is a forged one, it is for the concerned Court to take appropriate proceedings as deemed fit and in accordance with law.

Accordingly, this appeal is allowed by setting aside the order passed by the trial Court with a direction that whatever may be the transaction that shall take place, shall be subject to the result of the suit. No order as to costs.

In view of above order, no order on Civil Application No.5888/2006.

(P.B.Majmudar, J.)

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